

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Implementation of the Non-Accounting)
Safeguards of Sections 271 and 272 of the)
Communications Act of 1934, as amended;)
)
and)
)
Regulatory Treatment of LEC Provision)
of Interexchange Services Originating in the)
LEC's Local Exchange Area)

CC Docket No. 96-149

COMMENTS OF THE INFORMATION
TECHNOLOGY ASSOCIATION OF AMERICA

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EXECUTIVE SUMMARY

ITAA urges the Commission to adopt straightforward, enforceable separate affiliate and nondiscrimination requirements that will limit -- to the extent possible -- the BOCs' ability to impede competition in the interLATA information services marketplace. The Commission should apply these requirements to BOC provision of intrastate, interstate and international interLATA information services. This includes the BOCs' pre-existing as well as the future interLATA information services, both within and outside of their "in-region" states.

In implementing the separate affiliate and nondiscrimination requirements, the Commission should clarify that any BOC-provided information service that is capable of accessing, or being accessed by, interLATA facilities constitutes an interLATA information serviced and should therefore be subject to the requirements of Section 272. The Commission also should make clear that the term "information service" has the same meaning as the term "enhanced service," which the Commission has long used. Because there is no clear or principled dividing line between electronic publishing and other information services, the Commission should impose substantially the same -- if not identical -- separate affiliate requirements on the BOCs' provision of electronic publishing and other information services.

As the Commission correctly recognizes, Section 272 imposes several structural and transactional requirements on the BOCs' separate affiliates. There is a general obligation on the separate affiliate to "operate independently" of the affiliated BOC. To

any manner, including in the provision or procurement of goods and services. The separate affiliate also must have separate books, records and accounts; separate officers, directors and employees; cannot rely on its affiliated BOC's credit in any manner; and must conduct all transactions with its BOC-affiliate at arm's length.

The nondiscrimination provisions contained in Section 272(c) are straightforward. To implement these requirements, the Commission need do no more than announce that it will not allow any form of discrimination between a BOC and its separate affiliate. The Commission also should make clear that the nondiscrimination requirements in Section 272(e) bar discrimination against both unaffiliated carriers and information service providers.

In order to ensure compliance with the separate affiliate and nondiscrimination requirements, the Commission should require the BOCs to file compliance plans. The Commission also should require the separate affiliates to comply with the Commission's existing no-bundling, network disclosure and transmission-at-tariff requirements.

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**COMMENTS OF THE INFORMATION
TECHNOLOGY ASSOCIATION OF AMERICA**

The Information Technology Association of America ("ITAA"), by its attorneys, hereby submits the following comments in response to the Notice of Proposed Rulemaking ("Notice") which the Commission issued in the above-captioned proceeding on July 18, 1996.¹ In the Notice, the Commission has solicited comment on how to implement the non-accounting provisions of new Sections 271 and 272 of the Communications Act ("the Act"). These provisions prescribe structural and non-structural safeguards that are intended to prevent the Bell Operating Companies ("BOCs") from using their dominant position in

¹ See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, Notice of Proposed Rulemaking, CC Docket No. 96-149, FCC 96-308 (released July 18, 1996) [hereinafter "Notice"].

local exchange markets to impede competition in the markets for interLATA telecommunications and information services.

ITAA commends the Commission for its efforts to implement Sections 271 and 272 in a manner consistent with Congress' intent. ITAA believes that the Commission can best do so by strictly construing those provisions of the statute that are clear on their face, while focusing its efforts on clarifying the statute in those few instances where clarification is required. The end result should be straightforward, enforceable structural separation and nondiscrimination requirements that will limit -- to the extent possible -- the BOCs' ability to impede competition in the interLATA information services and other markets that they seek to enter.²

I. INTRODUCTION AND INTEREST OF ITAA

ITAA is the principal trade association of the nation's information technology companies. Together with its twenty-five affiliated regional technology councils, ITAA represents more than 9,000 companies throughout the United States. ITAA's members provide the public with a wide variety of information products, software and services. Among the most significant are network-based enhanced services, which the Act refers to as "information services." The information services furnished by ITAA's member companies are used by business, government and residential customers, and include such diverse

² ITAA also supports the Commission's efforts, in Docket 96-150, to establish accounting safeguards that will effectively implement the accounting provisions of new Sections 260 and 271 through 276 of the Act. See Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, Notice of Proposed Rulemaking, CC Docket No. 96-150, FCC 96-309 (released July 18, 1996).

offerings as credit card authorization, computer-aided design and manufacturing, database retrieval, electronic data interchange, gateways, information management, payroll processing, telemessaging, transaction processing, voice mail and other remote access data processing services.

As an organization of information service providers that are unaffiliated with local exchange carriers, ITAA has a significant interest in the safeguards that govern the BOCs' provision of information services. ITAA's member companies are now totally dependent on the BOCs for the basic telecommunications services needed to deliver their information services to their customers. Without effective safeguards, the BOCs could engage in cross-subsidization and access discrimination. They could use revenues from regulated telecommunications services to subsidize their competitive information service offerings, and they could manipulate their control over the local exchange so as to discriminate against their competitors. This would put all independent information service providers at an unfair competitive disadvantage and could force many of those providers to exit the market. The end-result would be to harm consumers, who would suffer from diminished choice of competitive information service providers and inflated information service rates.

ITAA has long advocated the use of structural separation and nondiscrimination safeguards to deter BOC anticompetitive conduct.³ Structural separation

³ ITAA, previously known as ADAPSO, has actively participated in each of the Commission's three Computer Inquiries, as well as in other Commission proceedings that have addressed open network architecture ("ONA"), comparably efficient interconnection ("CEI"), customer proprietary network information ("CPNI"), collocation and other competitive safeguards. ITAA also was an intervenor in

prevents cross-subsidization by eliminating most joint and common costs, thereby making improper cost allocations easier to detect. Structural separation prevents access discrimination by minimizing the opportunities for self-dealing and, to the extent such opportunities still exist, by also making them more visible.⁴ In enacting the Telecommunications Act of 1996 ("the Telecommunications Act"), Congress embraced this position.⁵ As the Commission seeks to implement Section 272, it should strictly construe the separate affiliate and nondiscrimination requirements contained in Section 272.⁶

California III, the case that overturned the Commission's ONA and CEI rules as insufficiently substantiated departures from the Commission's own structural separation requirements. See California v. FCC, 39 F.3d 919 (9th Cir. 1994) [hereinafter "California III"]. ITAA has argued consistently that the most effective (and only proven) means of preventing anticompetitive abuse is to require the BOCs to offer information services through structurally separate affiliates.

⁴ See Notice at ¶¶ 12-14.

⁵ See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 to be codified at 47 U.S.C. §§ 151 et seq. Hereinafter, all citations to the Telecommunications Act will be to its provisions as they will be codified in the United States Code.

⁶ In the Notice, the Commission suggests that its existing rules "have worked reasonably well and generally have been effective . . . in deterring the improper allocation of costs and unlawful discrimination." Notice at ¶ 146. In previous proceedings, ITAA and others have presented evidence that calls this assessment into question. See Comments of Information Technology Association of America, CC Docket No. 95-20, at 43-53 (Apr. 7, 1995). Whatever the Commission's view of the BOCs' prior conduct, vigilant enforcement of competitive safeguards will be critical once the BOCs are allowed to enter the interLATA services marketplace.

II. THE REQUIREMENTS OF SECTION 272 EXTEND TO INTRASTATE, INTERSTATE AND INTERNATIONAL INTERLATA INFORMATION SERVICES (¶¶ 21-29 & 32)

In the Notice, the Commission has recognized that the overriding purpose of the Telecommunications Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . ."⁷ As part of this policy, Section 272 expressly requires that the BOCs establish separate affiliates for certain of their interLATA services. The Commission has tentatively concluded that the structural safeguards required by Section 272 apply to intrastate, interstate and international interLATA services.⁸ ITAA agrees. Indeed, it would be implausible to read the Act in any other manner.

The Commission correctly recognizes that Section 272 replaces requirements imposed on the BOCs by the Modification of Final Judgment ("MFJ").⁹ The MFJ, of course, precluded BOC provision of interLATA services, both interstate and intrastate.¹⁰ The legislation provides no basis to conclude that, in lifting the MFJ prohibition on BOC provision of interLATA services, Congress intended to allow the BOCs to enter the intrastate interLATA market without complying with the competitive safeguards of Section 272.

⁷ Notice at ¶ 1 quoting S. Rep. No. 458, 104th Cong., 2d Sess., preamble (1996) (emphasis added).

⁸ See id. at ¶¶ 21 & 32.

⁹ See id. at ¶ 21.

¹⁰ United States v. Western Elec. Co., 552 F.Supp. 131, 227 (D.D.C. 1982) (subsequent history omitted).

Indeed, the Act's definition of "interLATA service" draws no distinction between intrastate interLATA and interstate interLATA services.¹¹ This analysis is entirely consistent with other aspects of the Telecommunications Act that create a pro-competitive policy that is applicable to both intrastate and interstate markets.¹²

Even if the Act did not expressly apply to intrastate interLATA services, the Commission has the authority, as the Notice recognizes, to preempt inconsistent state regulations.¹³ As discussed in more detail below, it would be impractical -- if not impossible -- for the BOCs to segregate interstate and intrastate information services in order to subject them to divergent federal and state regulatory regimes.¹⁴ As a result, state regulation that allowed a BOC to provide intrastate interLATA information services without complying with structural and nondiscrimination requirements could not feasibly coexist with federal rules requiring the BOCs to comply with such requirements when they provide

¹¹ See 47 U.S.C. § 153(21) (defining "interLATA service" as involving "telecommunications between a point located in a [LATA] and a point located outside such area").

¹² Section 253 of the Act preempts all state prohibitions on the entry of new entities into the intrastate telecommunications market and it otherwise clarifies the scope of state authority over intrastate providers. Similarly, Section 254 of the Act instructs the Commission to develop rules to promote universal service irrespective of interstate and intrastate distinctions; Sections 254, 255, 256 and 259 also promote access to telecommunications facilities for schools, libraries, healthcare providers, persons with disabilities and certain "qualifying carriers" without regard to whether the access is necessary to promote the provision of interstate or intrastate services. Although Section 261 of the Act allows for the continuation of state regulation in these areas, such regulation is permissible only if it is not inconsistent with the federal policies enunciated in the Telecommunications Act. See 47 U.S.C. §§ 253-256, 259 & 261.

¹³ See Notice at ¶ 29.

¹⁴ See Section IV infra.

interstate interLATA services. In such circumstances, as the U.S. Court of Appeals for the Ninth Circuit found in California III, the Commission may preempt state regulation.¹⁵

There also can be no doubt that the separate affiliate requirement of Section 272 applies to international interLATA information services. Again, according to the statute, an interLATA service involves the use of telecommunications between a point within a LATA and any point located outside such area.¹⁶ This leaves no room to dispute that the statutory provisions governing BOC provision of interLATA services applies to both domestic and international interLATA services.

III. SECTION 272 APPLIES TO THE BOCs' PRE-EXISTING INTERLATA INFORMATION SERVICES (¶ 34)

Section 272(h) of the Act gives the BOCs one year from the date of the Telecommunications Act's enactment to bring pre-existing interLATA services -- including interLATA information services -- and other activities into compliance with the provision's separate affiliate requirement.¹⁷ Section 271(f), on the other hand, states that: "Neither [section 271(a)] nor section 273 shall prohibit a [BOC] or affiliate from engaging . . . in any activity to the extent authorized by, and subject to the terms and conditions contained in, an order [of the MFJ court]. . . ."¹⁸ The Notice asks whether Section 271(f) in any way

¹⁵ See California III, 39 F.3d at 932-33.

¹⁶ See 47 U.S.C. § 153(21).

¹⁷ See 47 U.S.C. § 272(h).

¹⁸ 47 U.S.C. § 271(f).

affects the requirement in Section 272(h) that the BOCs provide pre-existing interLATA services through their separate affiliates.¹⁹

Whatever else it may do, Section 271(f) does not alter the BOCs' obligation to provide all interLATA information services through a separate affiliate. By its own terms, Section 271(f) exempts previously authorized activities only from Section 271(a), which governs the provision of interLATA telecommunications services,²⁰ and Section 273, which governs manufacturing activities. Nothing in Section 271(f) purports to limit the BOCs' obligation, under Section 272, to provide pre-existing interLATA information services through a separate affiliate by the one-year anniversary of the Telecommunications Act. Indeed, unlike Section 272(a)(2)(B) of the Act -- which exempts from the separate affiliate requirement those previously authorized interLATA telecommunications services described by Section 271(f) -- Section 272(a)(2)(C) states in no uncertain terms that the BOCs must provide interLATA information services through separate affiliates.²¹

IV. SECTION 272 REQUIRES A SEPARATE AFFILIATE FOR BOTH IN-REGION AND OUT-OF-REGION INTERLATA INFORMATION SERVICES; THE COMMISSION SHOULD REQUIRE THE SAME FOR INTRALATA INFORMATION SERVICES (¶¶ 41-50)

In the Notice, the Commission tentatively concludes that both in-region and out-of-region information services are subject to the separate affiliate requirement of Section

¹⁹ See Notice at ¶ 34.

²⁰ Section 271(a) provides that "[n]either a [BOC], nor any affiliate of a [BOC], may provide interLATA services except as provided in this section." 47 U.S.C. § 271(a). As mentioned, the Act defines "interLATA service" as "telecommunications between a point [within a LATA] and a point located outside such area." 47 U.S.C. 153(21).

²¹ See 47 U.S.C. §§ 272(a)(2)(B) & (a)(2)(C).

272.²² ITAA endorses this conclusion. Section 272(a)(2)(B) lists only three services that are exempt from the requirement that the BOCs provide interLATA telecommunications services through a separate affiliate: the origination of out-of-region telecommunications services, incidental interLATA services, and previously authorized interLATA telecommunications services.²³ Section 272(a)(2)(C) contains no exemption for BOC information services. Indeed, Congress specifically excluded information services from the list of incidental interLATA services which are exempt from the separate affiliate requirement pertaining to telecommunications services.²⁴

The Notice also asks how the Commission can distinguish between interLATA and intraLATA information services, and proposes a number of ways to draw such distinctions.²⁵ ITAA believes that the proposal to create presumptions based on how a service was classified under the MFJ, or whether a BOC filed a CEI plan for the service, should be rejected.²⁶ Rather, ITAA believes that the Commission should classify all

²² See Notice at ¶ 41. The Telecommunications Act does not expressly address the effect of BOC mergers on the definition of the BOCs' service regions. ITAA believes, however, that if two or more BOCs choose to combine the Commission should treat the entities to be combined as having a single service region that consists of the combined territories of the constituent BOCs. This approach will ensure that the Commission's regulatory treatment of the BOCs reflects the economic realities of the marketplace. See id. at ¶ 40.

²³ See 47 U.S.C. § 272(a)(2)(B).

²⁴ See 47 U.S.C. § 272(a)(2)(B)(i).

²⁵ See Notice at ¶¶ 43-47.

²⁶ See id. at ¶¶ 46-47.

information services that are capable of accessing, or being accessed by, interLATA facilities as interLATA information services.

The difficulty in distinguishing between interLATA and intraLATA information services is that information services are rarely, if ever, constrained by LATA boundaries. Unlike telecommunications services -- which involve the transmission of information of the user's own choosing between points selected by the user -- information services are not point-to-point services. Instead, their purpose is to act on, or respond to, information supplied by the user. This may take place in one LATA or multiple LATAs without user control or even knowledge. For example, a simple credit card verification inquiry involving a local merchant and a local bank may start out as a purely intraLATA event. If the credit card was issued by an out-of-state bank, the transaction could seamlessly and within seconds become an interLATA transaction, all without the knowledge of the consumer, merchant or bank. Thus, unless an information service provider has a physically intraLATA network than cannot access, or be accessed by, users or databases in other LATAs, it always has the potential to be, and likely is, used for interLATA transactions.²⁷

²⁷ The growing market for software driven "personal agents" further illustrates just how irrelevant and unpredictable geography is in providing information services. These software searching tools are a response to the information overload confronting modern consumers. Personal agents -- and not the consumer -- select the databases that will be searched to gather responses to consumer inquiries. This can be as simple as looking up the title of a database in a table and routing the consumer to that database or, alternatively, the agent can actually conduct the search for the consumer. In either case, constraining the agent to the artificially drawn geographic borders of a LATA would be impractical. The limited number of BOC information services is further testimony to the fact that there are very few information services which can be constrained, as a practical matter, to the intraLATA market.

Ultimately, rather than create artificial regulatory distinctions between interLATA and intraLATA information services, the Commission should consolidate this docket with the Computer III Remand Proceedings.²⁸ As ITAA and others have previously pointed out, the Ninth Circuit's decision in California III vacated the Commission's decisions in Computer III. The practical effect of California III is that it reestablishes the structural separation requirements of Computer II, which apply to all BOC information services.²⁹ The Commission should take the opportunity created by the Telecommunications Act to harmonize the Computer II structural separation rules with the requirements of Section 272 and require the BOCs to provide all information services through separate affiliates.³⁰

²⁸ See Notice at ¶ 50. In that proceeding, the Commission is considering the impact of the Ninth Circuit's second remand of the Commission's Computer III rules. See Computer III Further Remand Proceedings, 10 FCC Rcd 8360 (1995).

²⁹ See Comments of Information Technology Association of America, CC Docket No. 95-20, at 12-19 (Apr. 7, 1995).

³⁰ Contrary to the suggestion in the Notice, the Commission has never lawfully eliminated the structural separation requirements of Computer II. See Notice at ¶ 145 n.283. In California III, the court considered and struck down the Commission's Computer III Remand Order, which sought to eliminate the Computer II structural separation rules based on the Commission's adoption of nonstructural CEI and ONA safeguards. The court specifically found CEI to be ineffective because "competitors who otherwise would be able to compete effectively by offering more efficient packages of services had fundamental unbundling been accomplished might be excluded from the market entirely." California III, 39 F.3d at 929. The court also found that the Commission's CEI "safeguards are not a substitute for ONA and, without ONA, are not adequate to prevent access discrimination." Id. at 930. Thus, as a legal matter, there is no basis for operating under anything other than Computer II's structural separation regime. Section 272 of the Act reinforces this conclusion by affirming the policy considerations which underlie Computer II. By imposing structural separation in the interLATA market, Congress has found this mechanism to be the best available for discouraging the BOCs from acting anticompetitively in the information services market.

Such a result would respond to congressional concerns regarding the ability of the BOCs to engage in anticompetitive conduct in the information services marketplace. Requiring all of the BOCs' information services to be provided through a separate affiliate also would facilitate the Commission's enforcement of the Act by eliminating the BOCs' incentive to couch as intraLATA services those which do, in fact, reach beyond LATA boundaries.³¹

V. THE COMMISSION SHOULD CONFIRM THAT "INFORMATION SERVICES" ARE SYNONYMOUS WITH "ENHANCED SERVICES" (¶ 42)

In the Notice, the Commission seeks comment regarding the differences, if any, between the Commission's definition of enhanced services and the Act's definition of information services.³² The Notice tentatively concludes that the two terms are identical because they describe the same activities, even though the two definitions have different origins and use different wording.³³ ITAA agrees. Although the Telecommunications Act's legislative history is silent as to why Congress chose the MFJ's definition of information

³¹ Bell Atlantic's recently approved CEI plan for Internet access is a case in point. See Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Internet Access Services, CCB Pol. 96-09, DA 96-355 (June 6, 1996). Although framed as an intraLATA service, there is no practical, conceivable way in which Bell Atlantic can offer this service on an intraLATA basis. See Petition for Reconsideration of MFS Communications Company, Inc., CCB Pol. 96-09, at 13-20 (filed July 3, 1996) (pointing out, among other things, that Bell Atlantic's service cannot technically be limited to exchange access service).

³² See Notice at ¶ 42.

³³ See id.

services rather than the Commission's definition of enhanced services, Congress apparently did so because the Telecommunications Act was modifying the MFJ.³⁴

In the end, this choice is without regulatory significance because the two definitions describe the same activities. The Commission and the BOCs have repeatedly noted that the MFJ's definition of information services and the Commission's definition of enhanced services are substantially similar, if not identical.³⁵ As to the definitions themselves, the first clause of the enhanced services definition -- which includes computer applications that act on the format, code, protocol and similar aspects of subscriber information -- corresponds to the functions of "transforming" and "processing" information contained in the definition of information services. The second clause of the enhanced services definition -- providing subscribers additional, different or restructured information -- corresponds to the functions of "acquiring," "generating," "transforming" and "utilizing" information contained in the information services definition. And the third clause of the Commission's definition -- describing subscriber interaction with stored information --

³⁴ Even if the two terms were not synonymous prior to the Telecommunications Act, the Senate stated that, as technology changes, the Commission retains the authority to clarify which services fall within the definition of information services. See S. Rep. No. 23, 104th Cong., 1st Sess. 18 (1995).

³⁵ See Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd 2631, 2633 (1988) (the categories are "substantially equivalent"); Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1, 24 n.60 (1988) (categories are "apparently . . . similar"); Computer III Remand Proceedings, 6 FCC Rcd 174, 175 n.19 (1990) (for purposes of this proceeding, the terms "are used interchangeably"); Reply of the Bell Operating Companies in Support of Their Motion for a Waiver of the Interexchange Restriction to Permit Them to Provide Information Services Across LATA Boundaries, United States v. Western Elec. Co., Civ. Action No. 82-0192 (HHG) at 31 n.43 (filed Feb. 2, 1994) (the services "are, as a general matter, the same").

corresponds to the functions of "acquiring," "storing," "retrieving" and "utilizing" information as used in the definition of information services.³⁶

The structure of the Act and the Commission's regulatory framework suggest yet another reason why information services and enhanced services are one and the same. Both the statute and the Commission limit common carrier regulation to telecommunications services. Information and enhanced services, by contrast, are not subject to such regulation. If the two services were not co-terminus, currently unregulated enhanced services could suddenly become subject to regulation if they were found not to fall within the definition of information services. Plainly, such a result was not intended by Congress.

The enhanced services definition is also well understood. It has been interpreted, enforced and construed by the Commission on numerous occasions. By making clear that the definitions of information services and enhanced services are the same, the Commission can ensure that this precedent will remain applicable.

VI. THE COMMISSION SHOULD APPLY THE SAME SEPARATE AFFILIATE RULES TO ELECTRONIC PUBLISHING AND TO OTHER INFORMATION SERVICES (§§ 53-54)

In the Notice, the Commission asks for comments regarding the relationship between Section 272 and two other sections of the Act -- Section 260, which governs carrier provision of telemessaging, and Section 274, which governs BOC electronic publishing.³⁷

³⁶ Compare 47 C.F.R. § 64.702(a) with 47 U.S.C. § 153(20).

³⁷ See Notice at §§ 53-54.

The Notice inquires whether the BOCs must provide telemessaging services through the separate affiliate prescribed by Section 272, notwithstanding the requirement of Section 260 that all local exchange carriers provide telemessaging on a nondiscriminatory basis, free from cross-subsidies.³⁸ It is a well-settled principle of statutory construction that if two provisions of a statute can be given effect, the courts and agencies must do so.³⁹ Here, there is no inconsistency between Sections 260 and 272. Both can be satisfied by requiring the BOCs to provide telemessaging on a nondiscriminatory basis through a separate affiliate, free from cross-subsidies, and by requiring other local exchange carriers to provide such services on a nondiscriminatory, subsidy-free basis.

The Notice also invites comment on the relationship between electronic publishing services, which are subject to the separate affiliate requirements of Section 274, and other information services, which are subject to the similar separate affiliate requirements of Section 272.⁴⁰ This is an area in which the Act creates significant ambiguities. Although Section 274's definition of electronic publishing is long, it is by no means clear.⁴¹ Nor are the term's ambiguities dispelled by the Act's enumeration of services that are excluded from the definition.⁴² Unlike the Commission's distinction between enhanced services and basic telecommunications services, there is no clear or

³⁸ See 47 U.S.C. § 260.

³⁹ See, e.g., Plaut v. Spendthrift Farm, Inc., 115 S.Ct. 1447, 1452 (1995) (wherever possible, statutory provisions should be given effect).

⁴⁰ See Notice at ¶ 53.

⁴¹ See 47 U.S.C. § 274(h)(1).

⁴² See 47 U.S.C. § 274(h)(2).

principled dividing line between electronic publishing and other information services. In this regard, the Notice recognizes that there might be services that do not clearly fall within or without the statutory definition of electronic publishing.⁴³

Given the ambiguities inherent in the statute, the Commission should not attempt to draw a distinction between electronic publishing and other information services. Rather, the Commission should impose substantially the same -- if not identical -- separate affiliate requirements on BOC provision of information service and electronic publishing. This approach will help achieve one of the basic goals of this proceeding: establishing a set of clear implementing guidelines to govern the BOCs' provision of competitive services during the period in which the separate affiliate requirements are in effect. On the other hand, if the Commission creates distinctions between the two types of affiliates, the BOCs are certain to "game the system" by seeking to portray specific services as either an information service or as electronic publishing based on their perception of which requirements are more favorable to their interests. Policing such activity would consume scarce Commission resources better devoted to more productive efforts.

VII. THE COMMISSION SHOULD REQUIRE MAXIMUM SEPARATION BETWEEN THE BOCs' INFORMATION SERVICES AND LOCAL EXCHANGE OPERATIONS (§§ 58-64)

The Notice seeks comment on the way in which the Commission should implement the provisions of Section 272 that require: (1) each BOC to "operate independently"; (2) a BOC and its affiliates to have separate officers, directors and

⁴³ See Notice at ¶ 53.

employees; (3) BOC affiliates not to obtain credit which, upon default, would give the creditor recourse to a BOC's assets; and (4) transactions between a BOC and its affiliate to be at arm's length, reduced to writing and made available to the public.⁴⁴ In so doing, the Notice correctly recognizes that each of these provisions -- particularly the requirement that the BOCs' information service affiliates "operate independently" -- should be given effect.⁴⁵

The structural separation prescribed by Section 272, of course, is intended to serve as a safeguard against anticompetitive abuse in the form of cross-subsidization and access discrimination. Consistent with this purpose, the requirement that the separate affiliates "operate independently" from their affiliated BOCs should be construed to eliminate the possibility of either form of abuse. To deter cross-subsidization, the affiliate required by Section 272 should not share any property, personnel or contracts with an affiliated BOC that would result in joint and common costs. Nor should the affiliate obtain any goods, services or information from the BOC that an independent information service provider could not obtain from the BOC. Such a requirement is consistent with Section 272(c)(1) of the Act. That provision prohibits a BOC from discriminating in favor of its affiliate "in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards."⁴⁶

The "operate independently" language of Section 272 should also be construed in a manner that is consistent with Section 274(b). That provision requires a BOC's

⁴⁴ See 47 U.S.C. § 272(b).

⁴⁵ See Notice at ¶ 57.

⁴⁶ 47 U.S.C. § 272(c)(1).

electronic publishing affiliate to be "operated independently" from the BOC.⁴⁷ Section 274(b) spells out this obligation by requiring accounting separation; independent credit facilities; separate employees, officers and directors; no common ownership of property; arm's-length business relations between the BOC and its separate affiliates; no shared research, training or hiring; no shared use of each other's name, trademarks or service marks; and installation and maintenance of equipment at nondiscriminatory rates, terms and conditions.⁴⁸ The Commission should impose the same requirements on the BOCs' information services affiliates in order to satisfy the independent operation requirement contained in Section 272.⁴⁹

The requirement that a BOC's information services affiliate be physically, financially and legally separated from an affiliated BOC also is consistent with the Commission's past decisions regarding structural separation.⁵⁰ In its Computer II decisions, the Commission required the separation of accounts, personnel, marketing and facilities.⁵¹ Given the common goals of the Section 272 and Computer II structural separation requirements, the Commission should implement Section 272 as it did Computer II. Indeed,

⁴⁷ See 47 U.S.C. § 274(b).

⁴⁸ See id.

⁴⁹ See, e.g., Gustafson v. Alloyd Co., Inc., 115 S.Ct. 1061, 1067 (1995) (where the same words are used twice in the same act they are presumed to have the same meaning).

⁵⁰ It is clear that Section 272 is at least in part based on those earlier actions. Compare 47 U.S.C. § 272(b) with 47 C.F.R. § 64.702.

⁵¹ See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 475-79 (1980).

because of the more extensive BOC entry permitted by the legislation, the Commission should require even greater separation now. In this regard, the Notice recognizes that Section 272 is stricter than the Commission's Computer II decisions. Unlike Computer II, Section 272 "prohibits the sharing of in-house functions such as operating, installation, and maintenance personnel, including the sharing of [in-house] administrative services that are permitted under Computer II."⁵² ITAA agrees.⁵³

The Notice also asks what outside services a BOC and an affiliate might be allowed to share.⁵⁴ The answer lies in the absolute prohibition on discrimination contained in Section 272(c). As the statute makes clear, a BOC may not discriminate between its affiliate and others in the provision or procurement of goods or services. Thus, a BOC may not share outside services with its affiliate unless that opportunity is made available to others on a nondiscriminatory basis.

Finally, Section 272(b)(5) requires that all transactions between a BOC and its information services affiliate be conducted on an arm's-length basis, reduced to writing and made available for public inspection. In order for this section to be effective, the

⁵² Notice at ¶ 62.

⁵³ The Notice asks whether the Commission's Competitive Carrier decisions are relevant to interpreting Section 272. See Notice at ¶ 59. They are not. The Competitive Carrier safeguards permitted independent local exchange carriers to offer interexchange service as non-dominant carriers. In extending them to independent carriers, the Commission found that the safeguards would not be sufficient to protect consumers if the BOCs were reclassified as non-dominant. Nothing has happened subsequent to this decision that would alter this finding. See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization Therefor, 98 F.C.C. 2d 1191, 1198 (1984).

⁵⁴ See Notice at ¶ 62.

Commission should confirm that the term "transactions" is to be read broadly, so that the public inspection requirement achieves its intended purpose of allowing effective public enforcement of Section 272.

VIII. THE PROHIBITION AGAINST DISCRIMINATION IN SECTION 272(c) IS ABSOLUTE (§§ 65-80)

The Notice, like the Act, appropriately recognizes that structural separation, standing alone, may not prevent the BOCs from offering their affiliates discriminatory access to their networks and thereby impede competition.⁵⁵ The nondiscrimination provisions of Section 272(c) therefore play a critical role in safeguarding the information services market from anticompetitive conduct. As is true of the statute's structural separation requirements, Section 272(c)'s nondiscrimination rule requires only minimal clarification.

In the Notice, the Commission asks whether the general prohibition against discrimination contained in Section 272(c), which remains in effect until the separate affiliate requirement sunsets, subsumes the specific nondiscrimination requirements of Section 272(e).⁵⁶ Section 272(e) forbids the BOCs from providing preferential service to their own affiliates, and requires the BOCs to make their facilities available at nondiscriminatory rates, terms and conditions.⁵⁷ Clearly, any violation of Section 272(e) also would violate Section 272(c).

⁵⁵ See id. at ¶ 65.

⁵⁶ See id. at ¶ 66.

⁵⁷ See 47 U.S.C. § 272(e).